

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	NO. 03-430
	:	
WILLIAM HARRISON	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

FEBRUARY 7, 2006

On July 8, 2004, a jury found defendant William Harrison guilty of one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e). Before the Court now are defendant's motion to reconsider the denial of his Rule 29 motion, titled "Motion for Acquittal Based on Previous Rule 29 Motion," and defendant's motion for new trial pursuant to Rule 33.<sup>1</sup> The Court held a hearing on these motions on December 27, 2005.

I. BACKGROUND

This case has been before the Court since July 10, 2003, when the defendant William Harrison (a/k/a Sloan Anderson) was charged, by way of indictment, with one count of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and 924(e). Because this case has had a long and

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<sup>1</sup>Defendant drafted and submitted both written motions himself, unassisted by counsel. Counsel argued part of the motion for new trial at hearing before the Court on December 27, 2005.

somewhat convoluted history before the Court, the Court provides a chronology of the case below.

A. Preliminary Matters

Mr. Harrison initially appeared before Magistrate Judge Diane M. Welsh on August 7, 2003, and asked the court to appoint counsel because he was unable to retain private counsel. Magistrate Judge Welsh appointed the Federal Public Defender to represent the defendant. The appointed defender informed the Court that, after reviewing the indictment with the defendant, the defendant wished to waive a formal reading of the indictment and enter a plea of not guilty. No bail was set. Because of a state parole detainer, the defendant was returned to state custody pending the outcome of this case.

On August 13, 2004, after it was discovered that there was a conflict of interest with the Federal Public Defender, the defendant appeared before Magistrate Judge Carol Sandra Moore Wells. Magistrate Judge Wells appointed another attorney, Mr. Carlos A. Martir, Esq., to represent the defendant pursuant to the Criminal Justice Act. The defendant objected to the change because he had already met with a lawyer from the Federal Defenders and he did not wish to change lawyers. After Judge Wells told the defendant that he could ask the Court for a new lawyer if he was not satisfied with Mr. Martir's representation, the defendant accepted the appointment of new counsel.

B. Appearances Before the Court

The Court specially listed Mr. Harrison's case for trial on October 9, 2003. Pursuant to the motions from both the government and the defense, the Court continued the trial to October 23, 2003.

1. The October 23, 2003 trial date

On October 23, 2003, the Court was set to arraign the defendant on the superceding indictment<sup>2</sup> that was filed and to begin trial. At that time, Mr. Martir requested a week's continuance, stating that because the defendant had just arrived from state custody the day before, the defendant had not had the opportunity to fully review the discovery in his case. Mr. Harrison asked to address the court and indicated his desire to represent himself. In addition, the defendant presented the Court with "affidavits," the meaning of which were not clear.

The Court set a status and scheduling conference for Monday October 27, 2003, and directed Mr. Martir to meet with the defendant before that time and review the Government's discovery. The Court also granted the defendant's oral motion for a continuance and continued trial for a week, until October 30, 2003, finding pursuant to the Speedy Trial Act that the denial of

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<sup>2</sup> A superceding indictment was filed on October 21, 2003, charging the defendant with the same offense but adding the alias "William Anderson" to the indictment.

a continuance would deny the defendant effective assistance of counsel.<sup>3</sup>

2. October 27, 2003 status and scheduling conference

On October 27, 2003, at the status and scheduling conference, Mr. Martir reported to the court that although he had met with his client and had left a copy of the discovery materials with the FDC, they apparently had not been forwarded to the defendant. Mr. Martir also informed the court that the defendant still wished to proceed pro se. The Court asked Mr. Martir to bring a copy of the discovery materials to the defendant (by 4:30 p.m.) while the defendant was still at the courthouse. The Court stated that it would address the defendant's desire to proceed pro se after the defendant had the opportunity to review the discovery.

At that point, the defendant informed the court that his name was "Sloan William Anderson," not William Harrison as it is listed on the indictment (and superceding indictment).<sup>4</sup> The defendant then questioned the jurisdiction of the court in a lengthy speech to the Court.<sup>5</sup> As a result of the defendant's

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<sup>3</sup> The date was not meant to be a fixed date, but was set for scheduling purposes. (Tr. 5, October 23, 2003.)

<sup>4</sup> (Tr. 5-7, October 27, 2003.)

<sup>5</sup> The basis for Mr. Harrison's argument was not clear. (Tr. 7-11, October 27, 2003.)

behavior, the Court continued the arraignment until the following week. The agenda for the hearing on that date was: (1) to consider the issue of whether a competency examination should be ordered; and (2) if no competency examination was to be ordered, then the defendant was to be arraigned and the Court would address the defendant's desire to represent himself.<sup>6</sup>

3. Hearing to determine if a psychological/  
psychiatric evaluation should be ordered

A hearing to determine whether a psychological evaluation of the defendant should be conducted was held on November 4, 2003.<sup>7</sup> At that hearing, the Government argued that a psychological evaluation of the defendant should be conducted based on the defendant's multiple filings and "multiple ramblings," which included a motion under the War Powers Act, a motion sounding in contract, and his oral challenges to the jurisdiction of the court. Defense counsel, Mr. Martir, joined in the Government's motion. Upon further inquiry of the Court however, Mr. Martir revealed that, although the defendant did

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<sup>6</sup> The defendant's trial was continued from October 30, 2004 to November 4, 2004, pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A) and (B), upon the Court's finding that the defendant's interest in effective representation, either by himself or through a lawyer, would be impaired if his trial was not continued.

<sup>7</sup> The Government filed an unopposed motion for a competency evaluation on October 28, 2003, based upon the defendant's irrational and combative behavior before the court.

have the Government's discovery at that point, the defendant had refused to engage in any communications with Mr. Martir at all because he intended to proceed pro se.

When asked to speak on his own behalf, the defendant repeated his challenges to the jurisdiction of the Court, and addressed the issue of competency, although his position was not clear.<sup>8</sup> Upon consideration of the defendant's demeanor and his presentations in court, the pleadings filed by the defendant, and Mr. Martir's representations to the Court as to his lack of communication with the defendant, the Court concluded that there was reasonable cause to believe that the defendant may be incompetent to proceed pursuant to 18 U.S.C. § 4241(a).<sup>9</sup> Accordingly, the Court ordered the Bureau of Prisons to conduct a psychological examination of the defendant for a period of 30

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<sup>8</sup> (Tr. 6-8, November 4, 2003.)

<sup>9</sup> Pursuant to 18 U.S.C. § 4241, a "court shall grant [a] motion [for a hearing to determine the mental competency of the defendant] or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." In United States v. Jones, 336 F.3d 245, 256 (3d Cir. 2003), the Third Circuit articulated that ultimately the analysis of whether "reasonable cause" exists is "informed by the two-pronged test for legal competence articulated in the [Supreme Court's opinion in] Drope," namely whether the defendant (1) has the capacity to assist in his defense and (2) comprehends the nature and possible consequences of a trial.

days.<sup>10</sup>

#### 4. Competency evaluation and hearing

On February 17, 2003, the Federal Bureau of Prisons sent a report and psychological evaluation of the defendant to the Court. In the evaluation, the psychologist who evaluated the defendant unequivocally opined that the defendant was competent to stand trial.<sup>11</sup> Thereafter, a competency hearing was set for March 16, 2004. Prior to the hearing the Government filed: (1) a motion for order of competency; (2) a request for a pro se colloquy of the defendant; and (3) a response to the defendant's motions related to the court's jurisdiction. The competency hearing was continued to March 30, 2004, to allow substitute counsel to enter an appearance on the Government's behalf.

At the competency hearing on March 30, 2004, both the Government and Mr. Martir stood on the report of Bureau of Prisons, and motioned the Court to find the defendant competent. After being afforded an opportunity to speak by the Court, the

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<sup>10</sup> Time from the date of the order entered to the day the defendant was returned to the district and determined to be competent was excluded under the Speedy Trial Act pursuant to 18 U.S.C. § 3161(h)(1)(a), (h) and § 3164.

<sup>11</sup> Specifically, the evaluator found that: (1) Mr. Harrison did not suffer from a mental disease or mental defect under the law; and (2) Mr. Harrison was competent to stand trial (i.e., he possessed a rational and factual understanding of the proceedings, could assist legal counsel in his defense, and could rationally make decisions regarding legal strategy). (See Report 8.)

defendant did not object to the finding that he was competent to stand trial.<sup>12</sup> Upon consideration of the report and evaluation of Dr. Ryan, the representations of counsel, and having afforded the defendant an opportunity to speak, the Court found that the defendant was competent to stand trial and granted the Government's motion to that effect. After making that determination, the Court attempted to conduct a Faretta colloquy to determine whether the defendant was competent to represent himself.<sup>13</sup> The defendant would not answer any of the Court's questions, stating that he did not consent to the Court's jurisdiction and would not answer any questions until jurisdiction was established.<sup>14</sup> The defendant would not even answer the direct question of whether he wished to proceed pro se at that time. The Court then adjourned the hearing and scheduled a Faretta hearing for April 28, 2004.<sup>15</sup>

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<sup>12</sup> (Tr. 5, March 30, 2004.)

<sup>13</sup> Pursuant to Faretta v. California, 422 U.S. 806 (1975), a court must establish that a defendant who wishes to represent him or herself relinquishes the right to counsel "knowingly and intelligently," and is aware of the "dangers and disadvantages of self-representation." Id. at 835.

<sup>14</sup> (Tr. 7-8, March 30, 2004.)

<sup>15</sup> Once the defendant was found competent, the Speedy Trial clock began to run. For that reason, pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(1)(A) and (B), the Court excluded the time between March 30, 2004 to April 28, 2004, upon the Court's finding that failure to grant a continuance would deny the defendant effective representation by himself or counsel and would result in a miscarriage of justice.



## 5. The Faretta hearing

At the Faretta hearing on April 28, 2004, the Court began by asking the defendant if he wished to proceed pro se. Instead of answering the Court's question, the defendant again challenged the jurisdiction of the Court. The Court denied the defendant's challenges to the Court's jurisdiction, finding that under both the United States Constitution and Title 18 that the Court had jurisdiction to try the defendant for one count of possession of a firearm by a convicted felon.<sup>16</sup> Thereafter, the

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<sup>16</sup> The Court, a district court of the United States, has subject-matter jurisdiction over this criminal matter pursuant to 18 U.S.C. § 3231, which provides that "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." In the case at bar, the superceding indictment charged the defendant with violations of the laws of the United States of America. Moreover, the Constitution provides that a criminal trial against an individual shall be held in the state where the crime was committed. U.S. Const. art. III, § 2, cl. 3 and U.S. Const. amend VI. Venue was therefore proper in the Eastern District of Pennsylvania because the indictment alleged that the defendant committed the crime for which he was charged in the Eastern District of Pennsylvania.

Furthermore, the Court acquires personal jurisdiction over a criminal defendant when the defendant appears before the court, whether voluntarily or involuntarily. See United States v. Quatermain, No. 78-308, 1982 U.S. Dist. LEXIS 14996 (E.D. Pa. October 26, 1982). Personal jurisdiction is not defeated by the defendant's assertion that he was brought before the court illegally. See Frisbie v. Collins, 342 U.S. 519, 522 (1952)("[T]he power of a court to try a person for crime is not impaired by the fact that he ha[s] been brought within the court's jurisdiction by reason of a 'forcible abduction.'"); see also Ker v. Illinois, 119 U.S. 436, 444 (1886); United States v. Darby, 744 F.2d 1508, 1530 (11<sup>th</sup> Cir. 1984)(stating that the Ker-Frisbie doctrine, holds that "a defendant cannot defeat personal

Court again asked the defendant to state whether he wished to proceed pro se. Refusing to consent to the jurisdiction of the Court, the defendant would not answer any of the Court's questions.<sup>17</sup> Because the defendant refused to participate in the Faretta colloquy, the Court found that the defendant waived his right to represent himself and that Mr. Martir would continue to represent the defendant.<sup>18</sup>

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jurisdiction by asserting the illegality of the procurement of his presence"). Therefore, for all of the above reasons, the defendant William Harrison is properly before this Court.

<sup>17</sup> (Tr. 5-8, April 28, 2004.)

<sup>18</sup> (Tr. 9, April 28, 2004.) The Third Circuit has recognized that the Sixth Amendment right of self-representation is unique because it cannot be exercised without the concomitant waiver of another fundamental right that is also protected by the Sixth Amendment - the right to counsel. Buhl v. Cooksey, 233 F.3d 783, 789 (3d Cir. 2000). The Third Circuit has instructed that "[c]ourts must indulge every reasonable presumption against a waiver of counsel." Id. at 790. In order to overcome this presumption, a defendant must "clearly and unequivocally" make known his request to proceed pro se. Id. The law does not require the defendant to "recite some talismanic formula," in invoking his right to self-representation and the request need not be written or the form of a formal motion filed with the court. Id. at 792. It need only be an "affirmative" and "unequivocal" request. Id. As noted above, in this case, the defendant expressed his desire to represent himself during at least one previous appearance before the court. The defendant had also expressed his desire to proceed pro se through his counsel.

Because of the defendant's statements that he wished to proceed pro se, the Court attempted to make a determination that his waiver of his right to counsel was "knowing, voluntary and intelligent" based upon a "penetrating and comprehensive examination of all the circumstances." Buhl, 233 F.3d at 799 (quoting United States v. Welty, 674 F.2d, 185, 189 (3d Cir. 1982)). However, the court cannot properly make such a determination without conducting "an adequate inquiry under

Also at the hearing held on April 28, 2004, the Court arraigned the defendant on the superceding indictment filed on October 21, 2003 in this case. The defendant would not answer any of the Court's questions in the arraignment colloquy. Therefore, after reading the superceding indictment to the defendant (including the notice of prior conviction and the notice of forfeiture), the court ordered that a plea of not guilty be entered on the defendant's behalf.<sup>19</sup>

The Court then set trial in this matter for July 7, 2004, and entered an order: (1) denying all of the defendant's filing objecting to the jurisdiction of the court (as well as the defendant's oral objections); (2) finding that the defendant waived his right to proceed pro se; (3) directing that a "not guilty" plea be entered on his behalf; and (4) and setting trial in this matter for the abovementioned date.

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Faretta." Id. at 797. Because the defendant in this case refused to participate in the Faretta colloquy, the Court could not properly determine whether the defendant was knowingly, voluntarily, and intelligently waiving his right to counsel. As a result, the Court found that defendant had waived his right to represent himself and ordered Mr. Martir to continue to represent the defendant.

<sup>19</sup> The court also advised the defendant that if he wished to represent himself and he was willing and able to answer the Court's questions, the Court would make the determination of whether the defendant was knowingly, intelligently and voluntarily giving up his right to counsel. (Tr. 12, April 28, 2004.)

6. Trial and post-trial motions

Mr. Harrison was represented by Mr. Martir at his trial, which began on July 6, 2004. At trial, the government presented evidence that, at about 5:00 a.m. on September 24, 2002, Mr. Harrison was arrested by Philadelphia Police Officer Bill Erwin after Officer Erwin witnessed Mr. Harrison shooting a gun on the street. After the shooting, Officer Erwin pursued the defendant and watched the defendant throw an object, believed to be a gun, into a yard. Officer Erwin then apprehended the defendant, and placed him under arrest. Police Officers Myra Vinson and Salters Davis, who had by then arrived at the scene, retrieved a gun from a nearby yard, and took it into evidence. The government presented evidence establishing that the shell casings found at the scene of the shooting had markings that matched the firearm retrieved from the yard. Additionally, the government presented evidence that the defendant had prior convictions.

The defense did not present any witnesses, but asserted that the government had failed to meet its burden in establishing that the defendant was the individual who had fired the gun. The defense proposed that the defendant had not fired the gun, but had inadvertently been caught in a firefight.

The jury returned a verdict of guilty on July 8, 2004. On July 14, 2004, Mr. Harrison filed a motion for acquittal

pursuant to Federal Rule of Criminal Procedure 29.<sup>20</sup> The motion for acquittal was based on three grounds: (1) the prosecution withheld Brady evidence; (2) the prosecution did not "make out a case" against defendant because there was no identification of Mr. Harrison; and (3) the jury did not find the defendant guilty of affecting commerce.

On September 27, 2004, the Court convened in this case for a sentencing hearing. The Court denied defendant's Rule 29 motion, finding that there was no showing that any material had been withheld by the prosecution, and that the questions of identity and interstate commerce had been submitted to the jury and the jury had found beyond a reasonable doubt that as to both of those factors, defendant was guilty. The defendant then submitted a handwritten memo challenging the jurisdiction of the Court and the legality of the statutes under which he was convicted. The Court denied this motion as frivolous, but allowed it to be entered onto the record for the purpose of appeal.

The Court next proceeded to sentencing. While Mr. Martir had no objections to the presentence investigation report, Mr. Harrison raised a number of objections under Blakely v.

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<sup>20</sup> Mr. Harrison wrote and filed this motion with no assistance from counsel.

Washington, 524 U.S. 296 (2004), and to his criminal history.<sup>21</sup>

The Court continued the hearing to allow the government to respond to Mr. Harrison's objections.

On October 27, 2004, the government filed a memorandum responding to defendant's objections. On January 12, 2005, defendant sent the Court written objections. Mr. Harrison objected to the finding he was an armed career criminal, the finding that he was on parole when the instant offense was committed, the calculation of his criminal history, the finding that the illegally possessed weapon had an obliterated serial number, and the whole guidelines scheme as unconstitutional. These objections are pending awaiting sentencing.

The Court convened again for sentencing on March 16, 2005. The probation officer responded to defendant's objections in an addendum to the revised presentence report. At the March 16 hearing, the Court continued the sentencing, and ordered Mr. Martir to file a supplemental brief in support of defendant's objections and file new objections by May 16, 2005.<sup>22</sup> The sentencing was set for July 14, 2005, and was subsequently continued until September 6, 2005.

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<sup>21</sup> Mr. Martir and Mr. Harrison had not communicated regarding the presentence investigation report. Mr. Martir expressed that his client had not wanted to engage in any contact with him. (Tr. 13, September 27, 2004.)

<sup>22</sup> No supplemental objections were filed by defense counsel.

In early September 2005, defense counsel moved for another continuance of sentencing, contending that his client had presented him with newly discovered and potentially exculpatory evidence, and that he intended to investigate and file a motion for new trial. The Court granted this continuance and scheduled sentencing for October 14, 2005. On October 13, Mr. Martir requested yet another continuance to enable him to continue researching the new evidence, and the sentencing was continued to November 10, 2005.

On November 10, 2005, the Court held a hearing in this case. Mr. Martir represented that after his research into the newly discovered evidence, he had concluded he would not be filing a Rule 33 motion for new trial, and would be relying on the objections sent by defendant in January 2005 at sentencing. He also requested a continuance to prepare for sentencing. The Court granted the continuance.

Mr. Harrison filed a renewed motion for acquittal based on his previous Rule 29 motion<sup>23</sup> on November 21, 2005, and a motion for new trial based on newly discovered evidence on December 12, 2005.<sup>24</sup> Mr. Harrison also sent a letter to the Court indicating that he wanted to represent himself on his

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<sup>23</sup> The Court denied defendant's initial Rule 29 motion on September 27, 2004.

<sup>24</sup> Both motions were written and filed by defendant on his own.

latest motions and that he believed Mr. Martir was working with the prosecution to "seal this conviction," and had been withholding important evidence.

On December 27, 2005, the Court once again convened for sentencing in this case. After inquiry by the Court, Mr. Martir stated that there was no problem in his continuing to represent Mr. Harrison. The Court then colloquied Mr. Harrison, who stated that he agreed to be represented by Mr. Martir at the hearing. (Tr. 11, December 27, 2005.) Mr. Martir presented his argument and examined two witnesses, with cross-examination and rebuttal by the government.<sup>25</sup> The Court permitted Mr. Harrison to argue a point regarding the alteration of evidence by the government.

On January 5, 2006, the Court received another letter from Mr. Harrison in support of his motion for new trial, asserting, as he had in his written motion, that he had not received the documents attached to his motion before trial.

## II. DEFENDANT'S POST-TRIAL MOTIONS

The Court will first address Mr. Harrison's motion for reconsideration of the denial of his Rule 29 motion, and then his Rule 33 motion for new trial, argued on December 27, 2005.

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<sup>25</sup> Mr. Martir explained that he did not have evidence to support Mr. Harrison's claims regarding alteration of evidence and could not argue that point.



A. Motion for Reconsideration of Rule 29 Motion

On September 27, 2004, the Court denied defendant's post-trial motion for acquittal pursuant to Rule 29.<sup>26</sup> (Tr. 10, September 27, 2004.) Defendant's motion for acquittal was based on the following: (1) defendant failed to receive Brady material prior to his trial; (2) at trial, the government produced no witness to identify the defendant as the person with the gun; and (3) the government failed to prove that the gun in question was "in or affecting commerce." Defendant has filed a motion requesting the Court to reconsider its denial of the Rule 29 motion. The motion will be denied because the arguments presented were previously addressed on their merits and denied by the Court. In addition, this motion is untimely.

Mr. Harrison asserts that the denial of his initial Rule 29 motion was erroneous in that the government knowingly and intentionally withheld Brady materials, including tapes of 911 and dispatch calls from defendant. Mr. Harrison alleges he learned of the missing Brady material during trial, when the

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<sup>26</sup> Federal Rule of Criminal Procedure 29 provides that after a jury verdict, "a defendant may move for a judgment of acquittal." Fed. R. Crim. P. 29(c)(1). "In ruling on a motion for judgment of acquittal made pursuant to Fed. R. Crim. P. 29, a district court must review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence." United States v. Brodie, 403 F.3d 123, 133 (3d Cir. 2005). "A finding of insufficiency should be confined to cases where the prosecution's failure is clear." Id.

government mistakenly played the wrong section of a dispatch tape, and from the government's trial and sentencing memoranda. Mr. Harrison asserts that the government lied to the Court when it stated on September 27, 2004 that it had produced all materials to defendant. Additionally, Mr. Harrison suggests the Court may not have fully entertained his previous Rule 29 motion because the Court had been "agitated" by various court filings made by defendant.

The long and the short of it is that Mr. Harrison's disagreement with the Court's earlier ruling on his Rule 29 motion should be raised through the normal appellate process, not through a motion for reconsideration. See, e.g., United States v. Pellulo, 971 F. Supp. 159, 163 (D.N.J. 1997) ("A motion for reargument is not to be used as a vehicle to reargue matters already considered.") (aff'd in part, rev'd in part, 399 F.3d 97 (3d Cir. 2005)). The Court addressed defendant's allegation regarding the withholding of Brady material in September 2004, and found that the defense had made no showing to support this contention. (Tr. 9, September 27, 2004.) Defendant offers only his assertion that the government lied to support his renewed contention that evidence was withheld from him.

Specifically, Mr. Harrison argues that the misplaced cassette tape should have been produced, and is evidence of the withholding of Brady material. At the hearing on September 27,

2004, the Court asked the government to explain the circumstances surrounding the playing of the tape. Assistant United States Attorney Wendy A. Kelly for the government explained that about 10 seconds of the wrong dispatch call was played before it was stopped. The correct call was then played. (Tr. 5, September 27, 2004.) The Court then found there was no showing Brady materials had been withheld. (Tr. 9, September 27, 2004.) The defendant's disagreement with this finding is not a basis for a motion for reconsideration.

In addition, this motion is untimely. A motion for judgment of acquittal under Rule 29 may be made within seven days after the jury is discharged, or within a longer time period fixed by the court within the seven days. Fed. R. Crim. P. 29(c)(1). Unless an extension is granted, a renewal or a motion for reconsideration of the Rule 29 motion would also have to take place within the seven-day time period. In United States v. Gupta, 363 F.3d 1169, 1174 (11th Cir. 2004), the Eleventh Circuit found a motion to reconsider the district court's denial of defendants' Rule 29 motion untimely when it was filed a year after the initial denial. The court reasoned that "permit[ting] the unlimited renewal or reconsideration of fully decided motions would needlessly tie up judicial resources and seriously delay the final disposition of cases." Id. Even considering the fact that the defendant filed this motion for reconsideration without

aid from counsel, the motion was filed over a year after the Court's initial denial of the motion, and does not contain any new issues or information.

Any contention that the Court was "agitated" by defendant's numerous filings, and presumably was therefore motivated to rule against defendant, is without merit in light of the numerous continuances and accommodations awarded to defendant and his counsel. The motion will be denied.

B. Motion for New Trial Pursuant to Rule 33

On December 12, 2005, Mr. Harrison filed a motion for new trial based on newly discovered evidence pursuant to Rule 33.<sup>27</sup> Mr. Harrison attached the following evidence to his motion: (1) the government's Trial Memorandum; (2) the government's Sentencing Memorandum; (3) a transcription of a Philadelphia Police Radio Dispatch call from September 24, 2002, at 5:06 a.m.; (4) a City of Philadelphia incident history detail;

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<sup>27</sup> Federal Rule of Criminal Procedure 33 allows a court, upon motion of a defendant, to grant a new trial to that defendant if required in the interest of justice. Fed. R. Crim. P. 33 (2005). "A district court can order a new trial on the ground that the jury's verdict is contrary to the weight of the evidence only if it believes that there is a serious danger that a miscarriage of justice has occurred--that is, that an innocent person has been convicted." United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002) (citations and internal quotations omitted). "Unlike an insufficiency of the evidence claim, when a district court evaluates a Rule 33 motion it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government's case." Id. (citations omitted).

and (5) an itemized telephone bill. Defendant's argument is that this newly discovered evidence demonstrates that the description of the crime told by the Government at trial was false, and that his evidence shows that the government tampered with evidence.<sup>28</sup> He alleges that documents (3) and (4) were not received from the government until after the trial, and that this delay was a result of prosecutorial misconduct.

At argument on the motion for new trial on December 27, 2005, Mr. Martir argued in support of the motion for new trial. Mr. Martir presented testimony from Mr. Harrison and Ms. Rochelle Morgan, the defendant's girlfriend, and argued that this testimony established a factual scenario on September 24, 2002, the day the incident for which Mr. Harrison was convicted took place, that was different than that put forward by the government at trial. Additionally, after seeking leave of the Court, Mr. Harrison personally argued in support of his assertions regarding evidence tampering by the government.<sup>29</sup>

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<sup>28</sup> Mr. Harrison points to a discrepancy between the time listed in the government's trial and sentencing memoranda that Police Officer Bill Erwin saw the defendant shoot a gun (5:00 a.m.), and the time listed on the transcription of a radio dispatch log when a witness called 911 to report a shooting (5:06 a.m.) as evidence that the factual scenario put forward by the government was false. Additionally, Mr. Harrison asserts that the call logs do not support the government's case, and show that the government withheld tapes of calls from defendant.

<sup>29</sup> After inquiry from the Court, Mr. Martir explained that he did not have any evidence that the 911 log had been altered and that he could not "in good conscience, make such an argument."

In essence, both Mr. Harrison and Mr. Martir argued that the new evidence put forward, including the documents and the witness testimony, shows that Mr. Harrison had been initially detained as an eyewitness, not immediately arrested as having been engaged in the shooting. While detained as an eyewitness, in the back seat of the police car, Mr. Harrison made several phone calls, the times of which are printed on the cellular phone bill. The fact that he was able to make these phone calls, argues defendant, demonstrates that he was not placed under arrest for the shooting immediately, and the jury, if presented with this evidence, would have found defendant not guilty.

Mr. Martir relied on the testimony of defendant and Ms. Morgan to establish the existence of the phone and the bill, and to show the calls had been made. Mr. Harrison's argument was more elaborate, in that he attempted to show that the documentary evidence, when taken all together, shows that the government had altered the times on the phone logs to make the evidence consistent with its factual scenario.

Because all of this evidence was available to the defendant long before, and during trial, but was not used for apparent tactical reasons, the Court cannot consider it newly discovered evidence. Additionally, the evidence is not of such a

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(Tr. 9, December 27, 2005.) In light of the periodically strained relationship between Mr. Harrison and Mr. Martir, the Court permitted Mr. Harrison to argue in support of his theory.

nature that it would probably produce an acquittal. The motion will be denied.

A courts must apply a five-part test when determining whether a new trial based on newly discovered evidence should be granted: "(a) the evidence must be[,] in fact, newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) evidence relied on[ ] must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal." United States v. Jasin, 280 F.3d 355, 361 (3d Cir. 2002) (citing United States v. Ianelli, 528 F.2d 1290, 1292 (3d Cir. 1976)).

Mr. Harrison cannot satisfy the first, second or fifth prongs of the Ianelli test, above. All of these documents were available for review by Mr. Martir and Mr. Harrison before trial.

The government's trial memorandum was filed on October 10, 2003 (doc. no. 22). The transcription of the Philadelphia Police Radio Dispatch call was a portion of Government's Trial Exhibit 7(c), and the City of Philadelphia incident history detail was Government's Trial Exhibit 7(b). Regarding the sentencing memorandum, which of course was not produced before trial, all of the factual averments contained in the sentencing

memorandum were disclosed in the trial memorandum.

Even if the Court were to assume that the documents are new to Mr. Harrison, they were made available to his counsel before and during trial. See United States v. Lauderdale, 142 Fed. Appx. 25, 32 (3d Cir. 2005) (evidence was neither unknown or unavailable when it was located by defendant after trial but was available for review by counsel before trial). These documents are simply not newly discovered evidence.

Regarding the cellular phone records, the failure of defendant to acquire the telephone records until over a year after the trial belies any showing of diligence. Although Mr. Harrison explains that he only learned he could obtain past phone bills after the trial, this is not sufficient to except him from the diligence requirement. Mr. Harrison had the same access to the phone records before and during trial that he had after trial.

Squarely on point is United States v. Worrells, where the Third Circuit found the defendant did not act with the requisite diligence when he acquired phone records after the trial to show that his number had been disconnected at the relevant time. 94 Fed. Appx. 927, 929 (3d Cir. 2004). The Court explained, "[s]imply put, [the defendant] had the same access to the phone records after trial as he had both before and during trial. Using proper diligence, [he] could have contacted the



phone company and discovered the cellular phone number in question had been disconnected." Id.

The witness testimony presented by Mr. Martir is, again, not newly discovered evidence. Both the defendant and Ms. Morgan testified as to the events of the day on which defendant was arrested, September 24, 2002. The content of the testimony was available to the defendant since that date, over three years ago. The fact that defendant would not communicate with his counsel before trial does not merit an exception from the standards that must be met before a new trial is warranted.

Over eighteen months after trial, the defense in this case has put forward a new theory of the case, a factual scenario that the defendant and his counsel propose would have changed the minds of the jury. This is unacceptable. All of the information presented to the Court in December 2005 was available to be presented not only in July 2004, when the trial took place, but in September 2002, when the defendant was arrested. A new trial is not warranted.

Defendant alleges a complete communication breakdown between counsel and defendant. In his motion for new trial, defendant asserts that he was not provided by counsel with all of the government's discovery and pretrial submissions. During oral argument on December 27, 2005, Mr. Martir submitted to the Court that the reason counsel had been unaware of the telephone records

the defense alleges cast doubt on the government's factual scenario, was the defendant's refusal to communicate with counsel from the time of his indictment through September 2004, two months after the trial was completed.

The Court, however, cannot allow the defendant's efforts to manipulate the system, by his on and off communication with counsel, to foreclose the long delayed entry of final judgment in this case. During these proceedings, defendant was given multiple opportunities to act pro se or to dismiss his counsel, the last one on December 27, 2005, and repeatedly waived his right to do so.<sup>30</sup>

Additionally, the defense has not made a showing that the evidence presented would probably lead to an acquittal. At trial, the government put forward testimony from twelve witnesses to establish its proposed factual scenario. These witnesses included four police officers present at the scene on the morning of the incident, the detective who processed the crime scene, a woman who heard the shots and called 911, a 911 dispatcher, a woman who heard the shots and whose car was shot, and four expert witnesses who established the bullets at the scene came from the recovered gun, the origin of the recovered gun, and that the defendant had prior convictions. Based on this evidence, a

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<sup>30</sup> After questioning by the Court, Mr. Harrison stated, "Yes. He [Mr. Martir] can represent me." (Tr. 11, December 27, 2005.)

unanimous jury returned a verdict of guilty.

Even if the Court were to accept the defense's evidence here as "newly discovered," no showing has been made that it is of such a nature as to probably produce an acquittal. The possibility either that the defendant may not have been arrested immediately, or that the defendant may have been permitted to make telephone calls from the back of the police car does not detract from the government's evidence that the defendant had been the individual who had shot and then discarded a firearm on the morning of September 24, 2002.

The motion for new trial will be denied, and the case will proceed to sentencing.

### III. CONCLUSION

For the foregoing reasons, defendant's motion for reconsideration of the denial of his Rule 29 motion and his Rule 33 motion for new trial are denied.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	CRIMINAL ACTION
v.	:	NO. 03-430
	:	
WILLIAM HARRISON	:	

O R D E R

**AND NOW**, this **7th** day of **February 2006**, upon consideration of Defendant's Motion for Acquittal Based on Previous Rule 29 Motion (doc. no. 101) and Defendant's Motion for New Trial (doc. no. 103) and the Government's Response (doc. no. 106), and after a hearing at which counsel for both parties participated, it is hereby **ORDERED** that Defendant's Motion for Acquittal Based on Previous Rule 29 Motion (doc. no. 101) and Defendant's Motion for New Trial (doc. no. 103) are **DENIED**.

**AND IT IS SO ORDERED.**

S/Eduardo C. Robreno

EDUARDO C. ROBRENO, J.